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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 567

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libellant-Appellee-Respondent

AGAINST

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Appellant-Petitioner

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No ground for *certiorari* is shown. The petition shows neither a conflict between circuits nor a conflict with earlier decisions, and the decision of the Circuit Court of Appeals concededly follows the decision of this Court in *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370. It is argued that because the parties are foreigners and because the law of Sweden and Denmark would have required them to submit to arbitration, a different rule should be applied in this case. But whether arbitration shall be enforced is a matter of remedy, governed by the law of the forum, *Meacham* v. *Jamestown F. & C. R. R. Co.*, 211 N. Y. 346;

and there is no proof of the law of Sweden and Denmark, the case having been argued on exceptions. Also, the question is probably moot because the rights of the parties have already been determined by litigation, and arbitration would be useless now. At most the petitioner could only have a claim for damages for the respondent's failure to abide by the arbitration clause, and on that claim its damages would be merely nominal, *Munson* v. *Straits of Dover S. S. Co.*, 99 Fed. 787. Further, the arbitration clause was intended to apply only to disputes which might arise while the charter-party was being performed and not to a situation produced by a repudiation such as is shown by the petitioner's letters of January 8th and January 13th, 1915 (Record, pp. 6-12). When the contract has been repudiated subordinate terms cannot be enforced. In *Jureidini* v. *National British & Irish Millers Ins. Co., Ltd.* [1915] A. C. 499, Lord Chancellor Haldane said, at page 505:

> " Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

The same ruling was made by Mr. Justice Pitney in *O'Neill* v. *Supreme Council American Legion of Honor*, 70 N. J. L. 410. In that case the Supreme Council in a benefit certificate issued in 1891 agreed to pay the plaintiff's sister in trust for his six children $5,000 on proof of his death. In 1900 the Council amended its by-laws so that $2,000 should be the highest amount paid on the death of a member on any benefit certificate theretofore or thereafter issued. When the benefit certificate was issued a by-law to which it was subject provided that

"No action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership or benefit certificate, unless brought within one year from the time such action accrues."

The defendant alleged that the plaintiff's cause of action accrued August 20, 1900. The plaintiff accepted the amended by-law as a repudiation of the contract, but did not bring his action until more than one year after the amended by-law went into effect. Justice Pitney said, at pages 422–423:

"When the defendant, on its part, broke the contract, it absolved the plaintiff from the obligation thereof and the action to recover damages for such abrogation is not subject to any limitation that arises solely out of the terms of the contract that has been abrogated."

It is respectfully submitted that the petition should be denied.

New York, August 10, 1918

BURLINGHAM, VEEDER, MASTEN AND FEAREY
Proctors for Respondent

ROSCOE H. HUPPER
Counsel

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NOTICE OF MOTION.

Supreme Court of the United States

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner,

vs.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.

No. 567.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition and brief, I shall apply to the Supreme Court of the United States, at Washington, D. C., at the next motion day of said Court, on the first day of March, 1920, at the opening of the Court or so soon thereafter as counsel can be heard, for leave to intervene herein as *amicus curiae* and to file the accompanying brief, and to be otherwise heard upon

the argument in such manner as the Court deems proper.

Dated, February 20, 1920.

Yours, &c.,

JULIUS HENRY COHEN,
Counsel for the Chamber of Commerce of the State of New York,
111 Broadway,
New York City.

To:

HAIGHT, SANDFORD & SMITH,
Proctors for the Petitioner-Appellant.

To:

BURLINGHAM, VEEDER, MASTEN & FEARY,
Proctors for the Libelant-Respondent.

PETITION FOR LEAVE TO INTERVENE AS AMICUS CURIAE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN, Petitioner, vs. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.	No. 567.

To the Supreme Court of the United States:

The petition of the Chamber of Commerce of the State of New York respectfully shows to the Court:

I. Your petitioner is the oldest commercial or trade body in the United States. Its charter was granted by George the Third, April 5th, 1768, and the act confirming it was one of the first pieces of legislation passed by the State of New York, Chapter XXX, Laws of 1784, passed April 13th, 1784.

II. From its very earliest date, the Chamber has taken an active interest in the arbitration of commercial disputes. During the Revolutionary War and prior to Cornwallis' surrender, while the City of New York was still under martial law, Andrew Elliot, Superintendent-General, wrote (October 2nd, 1781): "As I was and still am of opinion that

Mercantile disputes cannot be adjusted in a more proper or more equitable way than by a reference to respectable Merchants, it gave me great satisfaction when the method was so generally agreed to, and I flattered myself that notwithstanding the trouble it gave individuals, that it would at least continue as long as I had any concern in the Superintendency. I shall be much concerned if these, my expectations, should be disappointed. The present Juncture of Affairs does not seem favorable for any new plans to be adopted. It has long been proposed (I hope Events are not distant that may admit of a Trial) to revive such part of the civil Authority by which justice may be administered to the Community. Individuals will then be freed from the Burthen of adjusting Mercantile disputes, and I shall be relieved from a most fatiguing anxious situation, but I beg you will assure the Chamber of Commerce that in all situations I shall ever retain the highest sense of Assistance and Support they have afforded me."

III. From 1874 down to 1895, the Chamber of Commerce housed the Court of Commerce or Court of Arbitration established by the Legislature of the State of New York in April, 1874, over which court the late Judge Enoch L. Fancher presided. Herein partnership cases, claims for salaries, cases arising on bills of lading, on shipments of goods from abroad, on marine insurance, etc., etc., were submitted to the arbitrator and satisfactorily disposed of.

IV. In 1911 a special committee on commercial arbitration, consisting of the following: James Talcott, Henry Hentz, Frank A. Ferris, Alexander

E. Orr, Charles L. Bernheimer, Chairman, recommended the plan for commercial arbitration which the Chamber put in operation and has since operated with great success. This plan is based upon provisions of the Code of Civil Procedure of the State of New York, permitting voluntary submissions to arbitration and providing for the entry of a judgment upon the award and the enforcement of the judgment as a judgment of a court of record (Chapter 17, Title VIII, of the Code of Civil Procedure, State of New York).

V. In the year 1915 the decision in the case of *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, which followed the decisions of your honorable court, held it was still the law in this country that a clause in a contract by which parties agreed to submit their differences to arbitration was revocable at the pleasure of either party. This decision came to the attention of the London Court of Arbitration. Shortly after its rendition, the London Court called the attention of your petitioner to the fact that if the decision of Judge Hough in that case were not reversed on appeal or the law changed, "a Citizen of the United States of America would be in the position to enforce an Award in his favour wherever delivered against a British subject, whether resident in England or any British Colony or Dependency * * * whereas, should the Award go against him, he could ignore it." The London Court of Arbitration further reported that "Recourse to arbitration in this Country (England), is very general, and it is a gratifying tribute to the efficiency with which justice is administered in the London Court

of Arbitration, that Foreign Merchants readily assent to the insertion in their contracts of a clause providing for the reference of differences thereto."

VI. Believing that the matter of the irrevocability of contracts, including the irrevocability of an agreement to submit a controversy to arbitration, was a matter vital to the trade and commerce of our country, your petitioner caused to be made a study of the questions of public policy and law involved in the matter, with the idea ultimately of submitting such study as *amicus curiae* to any court in which this question might again arise. This study is now in the form of a publication entitled "Commercial Arbitration and the Law" and was prepared by the counsel for your petitioner.

VII. Your petitioner is advised that there is presented once again for the consideration of this Court upon the appeal herein this question of the irrevocability of an arbitration agreement, arising in this instance out of a clause in a time charter as follows:

> "21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight."

VIII. Your petitioner respectfully asks leave to file with the Court, for the use of the members thereof, copies of the said publication, "Commercial Arbitration and the Law," for leave to intervene herein as *amicus curiae* and to submit the annexed brief, and, if it please the Court, in view of the grave importance of this subject to interstate and international commerce, that its counsel be heard orally.

All of which is respectfully submitted.

CHAMBER OF COMMERCE OF
THE STATE OF NEW YORK,
By JULIUS HENRY COHEN,
Its Counsel.

February 20, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

REDERIAKTIEBOLAGET ATLANTEN, Petitioner, vs. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET.	No. 567.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK AS AMICUS CURIAE.

Introduction.

The United States is entering upon a new era in international relationship. The business of its merchants is extending all over the world. Trade is growing with the Latin American Republics, with England, France and all other countries of Europe. The ability to dispose of commercial controversy without litigation is one of the most important factors in the development of trade, for if the merchant is obliged to resort to litigation in order to settle a dispute, he must take account of this contingency in fixing the price for his wares. In consequence, business men all over the world in their dealings with each other earnestly seek to find honorable methods for disposing of con-

troversy without recourse to the courts. The United States finds itself in the unique situation to-day of being practically the only important commercial country which fails to give to contracts for the submission of controversy to arbitration the legal sanction given to all other commercial contracts. The recent Pan-American Financial Congress, held in Washington, through its committee, presented eighteen recommendations for the better facilitating of business between the United States and Latin America, the fifteenth of which reads as follows:

> "15. That the plan of arbitration of commercial disputes in effect between the Bolsa de Commercio of Buenos Aires and the Chamber of Commerce of the United States be adopted by all the American countries."*

The Committee on Law Reform of the New York State Bar Association, in its recent report, made January 16th, 1920, said:

> "The demands of international commerce dictate that this nation should not be behind others, either in honesty or in the facilitation of contracts containing agreements for arbitration of disputes. The jealousy of judicial jurisdiction has led to a historical attitude of the Courts toward arbitration agreements, which is unintelligible at present to the business man. The subject has been the basis of a remon-

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* The agreement between the U. S. Chamber of Commerce and the Bolsa provides for a very simple method of arbitration of disputes arising between merchants in the United States and merchants in the Argentine Republic, by which arbitrators are selected and the controversy disposed of without litigation.

> strance from the London Chamber of Commerce to the Chamber of Commerce of the State of New York. In this day, it does not seem that any good public purpose is subserved by treating arbitration clauses as nullities and unenforcible."

At the Conference of Delegates from the American Bar Association and State and Local Bar Associations, held at Cleveland, Ohio, on the 27th day of August, 1918, the following resolution was adopted:

> "RESOLVED, That the Conference of Delegates of the American Bar Association and of State and local bar associations hereby recommends that the various State and local bar associations of the United States co-operate with individuals, State and local Chambers of Commerce and other organizations in the prevention of unnecessary litigation along the following lines:
>
> * * * * * *
>
> 4. *By encouraging and by making known the fact that they are encouraging the settlement of disputes out of court as far as practical,* and
>
> 5. By urging the bar and business men generally to pull together in each locality for the prevention of unnecessary litigation.
>
> * * *"

Believing that the time is ripe for a careful reconsideration of the state of the law upon the subject, we respectfully bring to the attention of the court the following points: (For the sake of brevity we shall refrain so far as possible from repeating the text and citations in the book, "Commercial Arbitration and the Law," and shall, for

the purposes of this brief, assume that permission will be granted to file copies of the book for the use of the court, and that free reference thereto may be made herein.)

Synopsis of the Argument.

We believe that we shall be able to sustain, without much difficulty, the proposition that *agreements for the submission of commercial controversies to arbitration are not against public policy, but that, on the contrary, public policy favors them.* We believe, too, we shall be able, without much difficulty, to convince the court that *such agreements should be encouraged by the law;* that the reason for the rule of revocability is not sound, and that, as the late Charles F. Southmayd said in arguing before the New York Court of Appeals in 1872 (*Delaware & Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 50 N. Y. 250, page 2 of Mr. Southmayd's printed argument): "if at any time within the last fifty years (1822-1872) the question would have been presented as a new one to the courts, no such doctrine would have been established." Even then it was, as he said, "upheld purely on the principle of *stare decisis.*" And, as Judge Hough said in deciding *U. S. Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. Rep. 1006, there is nothing save *stare decisis* to support the rule. (Judge Hough said that he failed to find any reason for "refusing to give effect to the agreements of men of mature age, and presumably sound judgment," and he regarded the plaintiff's action in refusing to carry out the provisions for arbitration as "this libelant's contract breaking." The rule, however,

could not be changed, he said, by the lower court, and until changed by the United States Supreme Court itself "must be obeyed * * * even though inferior courts fail to find convincing reasons for it.") We believe that we shall find little difficulty, also, in convincing the court that the rule *is unsound in law;* that is to say, that it is unsound as a matter of principle and theory, and that also it is *not sustained* by authority; in short, that it is not even sustained by *stare decisis.* We believe we shall be able to satisfy the court that the English law upon the subject is not now as it has been generally understood by American courts to be, and that the English courts have themselves corrected what they now regard as *judicial error.* The failure upon the part of American courts to effectuate the same result in American law has been due wholly to the fact that the matter has not been freshly considered in the light of later study upon the subject. We say with candor that we apprehend our greatest difficulty will be in persuading the court that *the rule should be modified by judicial action rather than by legislation,* and since we regard the latter as the more difficult of the points upon which to persuade the court, we shall go at once to it.

I.

If the Court should be convinced that public policy favors agreements for the submission of commercial controversy to arbitration and that the rule of revocability rests neither in reason nor in sound precedent, the Court should correct the error.

We respectfully direct the attention of the court to our consideration of this subject in Chapter IV,* wherein is discussed the rule of *stare decisis* and the theory for departing from it. *"Cessante ratione legis cessat ipsa lex."* We should like to bring once more to the attention of the court the words of Chief Justice Taney in *The Genesee Chief* v. *Fitzhugh,* 12 Howard 443, in which this court completely reversed its previous decision in *The Steam-Boat Thomas Jefferson,* 10 Wheaton 428 (1825). Said that learned justice:

> "It is the decision in the case of the Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made

* Page 39 *et seq.*, "Commercial Arbitration and the Law."

> in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day" (p. 456).

We should like, also, to bring to the court's attention the decision by the New York Court of Appeals, reversing itself upon the important subject of the constitutionality of the Bulk Sales Law. (*Klein* v. *Maravelas,* 219 N. Y. 383, reversing *Wright* v. *Hart,* 182 N. Y. 330.) Judge Cardozo said:

> "We think it is our duty to hold that the decision in *Wright* v. *Hart* is wrong."

Likewise, the decision of that court in *People* v. *Charles Schweinler Press,* 214 N. Y. 395, reversing *People* v. *Williams,* 189 N. Y. 131, in which the court said:

> "There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed."

(We would urge that the matter of international commerce is likewise a "vastly important question.") This court itself admonished the Bar in *Rosen* v. *United States, Pakas* v. *United States,* 245 U. S. 467, "that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here" and that the question then before the court must be examined "'in the light of general authority and of *sound reason*'"

(italics ours). Many other authorities of similar import will be found in Chapter IV. We cannot refrain, however, from quoting the language of the Kansas Supreme Court in *Thurston* v. *Fritz*, 91 Kansas 468, wherein it reversed *State* v. *Bohan*, 15 Kansas 407:

> "We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes additional justification."

Let us examine for a moment the nature of the rule now under consideration. It is not a rule of property. It does not affect title to real estate. It relates solely to the matter of remedy. The parties having agreed that controversy between them should be submitted to arbitration, the courts have declared that they may repudiate this part of the contract, however much they may observe the other provisions of the contract. If the court should now find, in the light of more complete understanding of the reasons of public policy involved, that such repudiations should not be permitted, it will, in effect, do no more than to sanctify the entire contract of the parties. It may very well be that fully to effectuate the contract will require legislative change, but this furnishes no reason why the court should not itself correct an error resulting wholly from judicial decision.

The theory of the common law is nowhere better expounded than by Mr. Justice Holmes in "The Common Law" (pp. 35-36). When

> "administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

Also (p. 41):

> "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

And, lastly, we would refer to the expression of Mr. Justice Lurton with reference to the rigor with which the rule of *stare decisis* should be applied (*Hertz* v. *Woodman*, 218 U. S. 205, at p. 212—italics ours):

> "The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is *not inflexible*. Whether it shall be followed or departed from is a question entirely within the *discretion* of the court, which is again called upon to consider a question once decided."

II.

The rule of revocability is against sound public policy.

The discouragement of litigation has always been regarded as sound public policy. Upon the canons of ethics for the conduct of the Bar printed and distributed by the American Bar Association appears the following quotation from Lincoln:

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man."

In 1914 the New York State Bar Association created the Committee on Prevention of Unnecessary Litigation. That committee, in an exhaustive report, referred to the system of commercial arbitration existing under the rules of the Chamber of Commerce of the State of New York, proposed the establishment of a similar system by the State Bar Association, and at the 1916 session of the New York State Bar Association was authorized to negotiate with the Chamber of Commerce for the adoption of "Rules for the Prevention of Unnecessary Litigation." These rules appear in Appendix A to the book. Under the heading "Prevention of Litigation After the Facts Become Fixed and Before Suit," this body of lawyers gives the following advice:

> "After the facts upon which a dispute can be based have become fixed, either before or

after a dispute has arisen, it is possible to do much to prevent litigation. What can best be done in each case and whether with or without legal advice, necessarily depends upon the facts and the parties to the prospective controversy. Differences may be minimized, adjusted or arbitrated. If not so disposed of, litigation will usually ensue."

Arbitration.—"Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the Code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association.

"The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful."

It may fairly be said that it is the modern opinion of the Bar of this country, as well as the almost unanimous opinion of business men, that the arbitration of commercial disputes is in the direction of discouraging litigation. But it does more than discourage litigation. It disposes of differences without creating hatred. It enables business men to settle their differences without becoming bad friends. It offers the way out for honorable men to yield without offense to or loss of their pride. Not only does it economize in the direction of avoiding the cost of the litigation itself, but it economizes in the saving of the time of business men and in the avoidance of the friction that might otherwise come about. In Chapter III will be found a review of the public opinion of the past and in other coun-

tries upon this subject. Morse, writing on "Arbitration and Award," says:

> "The tendency among business men to avoid the public tribunals and to settle their disputes by arbitration before individuals of their own choosing is growing stronger year by year. Not unnaturally they feel that they can obtain a more intelligent and satisfactory, as well as a more prompt, determination from eminent lawyers or merchants whom they select, and in whom they feel confidence, than they can venture to expect from an average jury" (Preface, p. iii).

Among the Romans, in Scotland, Denmark, in the old Hebrew State, in Ireland, Holland—all over the world there seems to be a body of experience and fact justifying this confidence in arbitration as a measure for preventing litigation. Perhaps nowhere is to be found a better description of its effectiveness than that by Coleridge, J., in Note 14 to 3 *Blackstone's Commentaries,* page 17:

> "Excellent as trial by jury undoubtedly is as a means of investigating the truth, yet there are cases to which, for various reasons, it is not applicable. Thus when long and complicated accounts are to be examined, it can hardly be expected that twelve men placed at hazard in the jury-box should be able to determine very accurately upon the allowance of particular items, or to strike a nice balance between the contending demands. Again, it will often happen that two persons lay claim to the whole of the same thing as a matter of mere right, which, under proper regulations, might very well suffice for both, and of which it might be ruinous to either to be wholly deprived, as a stream of water, yet in such case the verdict of the jury can only determine to whom

the right belongs, it cannot look to the consequences nor make a beneficial division of the use between both. In this way (arbitration) the parties have the benefit of a more deliberate investigation; if the matter be of a scientific nature, or removed from the common information of men, they may select someone to decide it whose habits have made him conversant with it, and by investing him with more or less power, they may have a decision more single and unbending than that of the law, prospective in its operations, and limiting in detail the future exercise of disputed rights."*

III.

The doctrine of revocability is based upon judicial error.

As Part II of the book is devoted to the exposition of this point, we shall do no more than to summarize briefly the results of that review. The English common law was not opposed to arbitration. On the contrary, it encouraged arbitration. The decision in *Vynior's Case* by Lord Coke is not really a decision against arbitration. Upon analysis, it is found to rest wholly upon the fact that in that case there was involved a bond conditioned for the faithful performance of an agreement to arbitrate. One of the parties revoked the authority of the arbitrator and suit was brought upon the bond. Notwithstanding the revocation, the bond was enforced. The famous quotation of Lord Coke, upon which rests the alleged doctrine of revoca-

* This note cannot be found in the American editions, but is given as quoted by Billing, "Law of Awards," pages 16 and 17.

bility, upon analysis is found to be only a dictum long since repudiated in the English common law.*

It was not consonant with earlier decisions upon the subject, nor with later ones, and for many, many years in England has not been treated as authority. In theory, the doctrine rested upon the conception that the arbitrator was in some fashion the agent of the party and that the principle of revocability of the agent's authority applied to arbitrations. But for many years the idea that the arbitrator was anything less than a judge has been repudiated. The many cases to be found in the Year Books (see Chap. IX), earlier precedents contra to Coke's dictum, the effect of Coke's dictum upon the law, the refusal to follow it by other distinguished jurists (see Chap. XI) seem to indicate that only a careful review of the authorities was necessary to make clear that the Bar and the Bench had been led astray for many years, and that a mere *obiter dictum* by process of repetition had become a doctrine of the law; that in truth, so long as the law permitted recovery of penalties, the bond accompanying the arbitration agreement was adequate protection to the parties (see Chap. XII, p. 148), but with the passing of fines and penalties (Chap. XII) the adequate remedy disappeared, leaving the dictum surviving. It may be said in passing that the reasoning supporting Coke's dictum in the *Vynior Case* is much more understandable in the light of the strict formality of pleadings prevailing in his day and much more sympathetically received by analytical students than the alleged doctrine based upon "ousting the courts of jurisdiction" (see Chap. XIII). This

* Ch. XVI, p. 208.

alleged doctrine rests upon very little, if any, reasoning, and upon no real authority. For Lord Kenyon's decision in *Halfhide* v. *Fenning,* 2 Brown's Chancery Cases 336 (1788), is still the law. The rule of *Kill* v. *Hollister,* 18 Geo. II 1746, 1 Wils. 129, is disposed of in 1855 in the House of Lords in *Scott* v. *Avery,* wherein Mr. Justice Coleridge says:

> "I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals" (5 H. L. C. 811, at p. 843).

Even in 1856 the spirit of the English courts was to leave "parties at full liberty to refer their disputes at pleasure to public or private tribunals." Lord Chancellor Cranworth, who presided at the trial of *Scott* v. *Avery* in the House of Lords, and who, as Lord Coleridge later said, was "no mean authority," presided the same year in the House of Lords in *Drew* v. *Drew,* and in that case, referring to the doctrine that either party might at any time revoke a submission to arbitration, said:

> "That was an inconvenient, and, I think I may be allowed to say, an irrational state of the law. * * * I say that was an absurd state of the law, which has since been rectified, and now the law may be represented as being that neither party to a submission can stop an arbitration pending its proceedings without first obtaining the sanction of some Court of Westminster Hall, or of one of the Judges, for so doing" (2 Macq. Reports [H. of L.] 1, pp. 3, 4, March, 1855).

In 1856, in *Russell* v. *Pellegrini,* 6 Ellis & Blackburn 1020, Lord Campbell, who also sat in *Scott* v. *Avery,* said:

> "Somehow the courts of law had in former times acquired a horror of arbitration; and it was even doubted if a clause for a general reference of prospective disputes was legal. I never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed. The decision in *Scott* v. *Avery,* that an agreement that there should be a reference before the party should be at liberty to sue might be so made as to be binding, was a very wholesome decision" (pp. 1025, 1026).

And in 1859, Baron Martin, who was reversed by Lord Cranworth and Lord Campbell in *Scott* v. *Avery,* says: "*Scott* v. *Avery has overruled all* the previous decisions on the subject." "Lord Campbell certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by the arbitrator." And "I think that the decision in *Scott* v. *Avery* cannot be upheld unless the judgment of Lord Campbell is right." And Baron Martin says: "*Scott* v. *Avery* was nothing more than the case of a policy of insurance, with a clause that, in the event of any difference between the underwriters and the insured, it should be referred to arbitration. Lord Campbell certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by the arbitrator. It seems to me," says the Baron further, "that *Scott* v. *Avery* has overruled all the previous de-

cisions on the subject." He is of opinion, therefore, that "If parties choose to arrange that, before any action is brought on a policy of insurance, an arbitrator shall ascertain the sum to be paid," that seems to him "only a circuitous mode of saying that no action shall be brought" (*Horton* v. *Sayer*, 4 H. & N. 643, at p. 650).

It is true that during the period from 1855 down to 1887 the English decisions seemed to be in a state of confusion. But by 1856, Lord Chancellor Cranworth and Lord Campbell in *Scott* v. *Avery* (1855-1856), Lord Chancellor Sugden in *Dimsdale* v. *Robertson* (1840), Lord Eldon in *Waters* v. *Taylor* (1807-1808) and in *Harcourt* v. *Ramsbottom* (1820), Lord Kenyon in *Halfhide* v. *Fenning* (1788), Baron Jeffreys in *Norton* v. *Mascall* (1685), Sir Henry Montague in *Browne* v. *Downing* (1620), Yelverton and Laken in 8 Edw. IV, 9 and 10 (1468), the entire bench in *Brode* v. *de Ripple* (1375), the entire bench in 1389 and the Judges during the reign of Henry III (1216-1272) all had agreed upon what may be paraphrased as follows:

"Mutual promise to abide by the award of certain men is good enough to bind them to abide by the agreement"; * * * "it is fit that the same should be performed." If either revokes, he has done something "bad in equity." "Public policy requires that effect should be given to such contracts," and that the parties should be left "at full liberty to refer their disputes at pleasure to public or private tribunals." Parties may select any means they choose for determining upon what basis they shall release each other, or what shall be due one from the other, and arbitration is a convenient, inexpensive and desirable means for

accomplishing such a result. He who cancels his obligation so to arbitrate is guilty of inequity and is not deserving of the aid of a court of equity.*

By 1887, the dictum in *Vynior's Case* had entirely disappeared. The doctrine of ousting the courts of jurisdiction had been repudiated, and in equity Lord Eldon's view prevailed. *If the parties agree to resort to arbitration, they should go to arbitration. If they do so, the courts will not set aside the award, save upon grounds of equity.* (Chapter XVI, p. 207.) In 1892, by clear analysis of the English judges themselves, not by act of Parliament, the error in the development of the English common law becomes visible and is corrected in the case of *Hamlyn & Co.* v. *Talisker Distillery,* 21 Session Cases (4th Series), 21 (see Chapter XVI, Correction of a Judicial Error, p. 208) and in *Caledonian Insurance Co.* v. *Gilmour,* L. R. [1893] App. Cas. 85, in *Trainor* v. *Phoenix Fire Assurance Company,* 65 L. T. R. 825, in the Queen's Bench Division, wherein Lord Coleridge himself said that

> "*Scott* v. *Avery* is a case to show not that the jurisdiction of the courts has been or can be ousted, as has been sometimes suggested, but that you do not oust the jurisdiction of the court, and do not come within the authority of the earlier cases * * * because you refer the question of liability, as well as the question of amount; and one of the judges, I think in the Exchequer Chamber, certainly in the House of Lords, points out that for the ascertainment of the amount of liability it must often be essential to go into the principal question of liability it-

* Chap. XVI, p. 205 *et seq.*

> self, and to ascertain not only whether the liability exists to any extent, but also whether it exists at all, and, although that must be so in many cases, nevertheless, it has never been suggested that the jurisdiction of the courts was ousted."

In the last decade of the century, under a general provision in articles of co-partnership for arbitration of all matters in difference between them, an arbitrator has power even to award a dissolution of the partnership. *Walmsley* v. *White,* 40 W. R. 675 (1892), reversing *Joplin* v. *Postlethwaite,* 61 L. T. R. 629, and following *Russell* v. *Russell,* L. R. 14 Ch. D. 471, 28 W. R. Dig. 154; *Vawdrey* v. *Simpson* (1895), per Chitty, J., 65 L. J. (Ch.) 369, L. R. (1896) 1 Ch. 167, 44 W. R. 123; *Belfield* v. *Bourne,* 8 R. 61 (1894), L. R. [1894] 1 Ch. 521, 63 L. J. (Ch.) 104). In *Belcher* v. *Roedean School Site and Buildings Limited,* 85 L. T. R. 468 (1901), decided in the Court of Appeal, the arbitrator is the architect for one of the parties. Collins, M. R., says:

> "It is nothing unusual for the parties to a building contract knowingly to submit their differences to an arbitrator who is not, and is not expected to be, absolutely unbiased. In these cases, where the builders dispute what the architect has done, they will *ex hypothesi* think that the architect is in the wrong, and, perhaps, so grossly wrong, as to be even fraudulent. But is the mere fact of such a dispute to be allowed to rescind the terms of the agreement, and oust the jurisdiction of the architect, the arbitrator agreed on by the parties? Certainly not."

One of the interesting changes observable is that at this point in the evolution of the law the court is jealous of *ousting the arbitrator of jurisdiction.*

> "Can one of two parties, by making the most injurious charges against the arbitrator, charges which in this case * * * are founded on very scanty materials, at once oust his jurisdiction?" "To hold that," says the Master of the Rolls, "would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by the parties to contracts, and to avoid stipulations for the prompt decision of disputes by named persons chosen because they are instructed and informed, on whose decision one party is entitled to insist, and to whose decision the other is bound to submit, unless he can show some real bias on the part of the arbitrator which was not contemplated when he was chosen."

In 1893, Lord Chancellor Bowen says in *Jackson v. Barry Railway Co.,* L. R. [1893] 1 Ch. D. 238, at page 247:

> "It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business."

And by 1903, in *Austrian-Lloyd Steamship Co. v. Gresham Life Assurance Society, Lim.,* 72 L. J. (K. B.) 211, a policy of insurance which provides that

> "all the parties interested expressly agree to submit to the jurisdiction of the Courts having jurisdiction in such matters of Budapest"

is held to be a submission to arbitration binding upon the courts of England, Romer, L. J., saying:

> "It is not as if the insurance company alone merely agreed to submit themselves to the jurisdiction of the Courts at Budapest. Here both the parties to the contract have mutually agreed to submit. If the parties, instead of agreeing to submit all disputes that might arise under the contract to the Courts at Budapest, had agreed to submit them to a named arbitrator, there could not possibly be any doubt that the person named was the arbitrator to decide any disputes. I think the meaning here is the same."

Finally, in 1907, Holmes, L. J., in *Gaw* v. *British Law Fire Insurance Co.* (1908), 1 I. R. 245, says, discussing the effect of *Scott* v. *Avery:*

> "It will not be denied that that decision legalizes a stipulation in a contract that any difference as to the amount of liability thereunder is to be referred to arbitration, and that no action can be maintained until the amount is so settled, and then only for such sum as shall be awarded. Speaking for myself, however," says he, "I have always been of opinion that *Scott* v. *Avery* went farther than this, and is an authority that a contract may legally provide that where a difference arises thereunder relating to other matters than amount, no liability is to arise, and no action is to be maintained until the matter of difference has been made the subject of arbitration and award. This," says the learned judge, "has been not only my

opinion, but is, I think, the view generally taken by lawyers during the last forty years."

He quotes Martin, B., in *Tredwen* v. *Holman* and disapproves of Brett's dictum in *Edwards* v. *Aberayron Mutual Ship Ins. Society.* He says:

"Lord Esher, then Brett, J., distinctly, and Kelly, C. B., with more doubt, took the narrow view of *Scott* v. *Avery* on which Mr. Justice Ross has acted. It must however, be remembered that in doing so they not only differed from the majority of the Exchequer Chamber, but from the three judges of the King's Bench. The *Aberayron Case* has, as far as I am aware, been only referred to in one subsequent English case, *Trainor* v. *The Fire Insurance Co.,* in which Lord Esher's view of the effect of *Scott* v. *Avery* was dissented from; and in *Scott* v. *Mercantile Acc. & Guarantee Ins. Co. Limited* Lord Esher himself gave a judgment absolutely inconsistent with his dicta in the *Aberayron Case.*"

Lord Justice Holmes then quotes with approval Lord Watson's words in *Caledonian Ins. Co.* v. *Gilmour* regarding the principle of *Scott* v. *Avery.* Accordingly, Judge Ross is reversed. The holding is that even an issue of *fraud* must be left to arbitration. Lord Cranworth's interpretation of *Scott* v. *Avery* becomes the effective rule of law. In 1914 there arises in Admiralty the *Cap Blanco* case, involving a clause in a bill of lading providing that any disputes "are to be decided in Hamburg according to German law." The court says:

"In dealing with commercial documents of this kind, effect must be given, if the terms

of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court."

(*The Cap Blanco,* 83 L. J. [P.] 23 [1913]; 109 L. T. R. 672; 29 T. L. R. 557. Evans, P. Appeal withdrawn. *See* 83 L. J. [P.] 23. C. A.) And in 1913 the Privy Council, in an appeal from Canada, holds that: "When an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege," note the word, "of a court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights." "This rule," says Lord Shaw, delivering the judgment of their Lordships, "is in truth founded upon the soundest principle" (note that he does not rest it upon Parliamentary legislation), "it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties." And now (1913) his Lordship believes: "It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* might be referred to." The question before the Lords, says his Lordship, "went in

principle to the incapacity of a court of law to effectuate justice, by itself undertaking a duty to supply a defect which had occurred in the prescribed mode of ascertaining the rights of parties." (*Cameron* v. *Cuddy*, [illegible] R. [1914] A. C. 651, at pp. 656, 658.) This latter decision is not based upon the Arbitration Act of England of 1889; it is a mere consequence of the sound application of the principles of the common law. In the recent case of *Bright* v. *Gibson*, 32 T. L. R. 533, May, 1916, there came before King's Bench a contract containing the following clause:

> "Any dispute on the contract to be settled by arbitration in the usual manner, for which purpose it may be made a rule of court."

One of the parties was a firm of cotton-spinners and the other was a firm of chemical manufacturers. Owing to war conditions, a dispute arose concerning the furnishing of a supply of Epsom salts. Under the arbitration clause, the chemical manufacturers named a Mr. Heap as their arbitrator and delivered a notice to the cotton-spinners calling upon them to name their arbitrator. Upon failure to name another arbitrator, Mr. Heap notified the parties to attend before him and the cotton-spinners refused to attend. Mr. Heap proceeded without them and awarded the chemical manufacturers all they claimed. Then counsel for the cotton-spinners made application to the court to set aside the award upon the ground that, the arbitration not having been had in accordance with the Arbitration Act of 1889, it was invalid, inasmuch as under that act there should have been a reference to a sole arbitrator named by both parties jointly, or, in default

of agreement, to an arbitrator appointed by the court under Section 5 of the act. "The phrase 'in the usual manner,'" argued Mr. du Parcq, "must mean 'in accordance with the law of the land.'" On the other hand, the respondents claimed that the phrase meant "according to the custom of our particular trade." Mr. Justice Rowlatt (Rowlatt and Sankey, JJ.) delivers the judgment. The court refuses to accept the interpretation that "in the usual manner" means, as a matter of law, "in accordance with the Arbitration Act, 1889." "The court did not think that that was so. They thought that the clause referred to 'the habitual form of arbitration adopted in fact.'" The applicants were given opportunity to show what the habitual form was, but their application to set aside the award was denied.

In *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (1916), 2 Ch. 86, a case arose upon the following facts: "S., C. & B. had made contracts to purchase beet sugar to be delivered f. o. b. at Hamburg in August, 1914. On July 31, 1914, the German Government placed an embargo on the export of beet sugar. S., C. & B. contracted with B., G. & Co., neither party knowing of the embargo, to sell to them sugar to be delivered at Hamburg. This contract incorporated the rules of the Sugar Association of London, including a war clause whereby in the event of a German war contracts were to be deemed to be closed and were to be referred to the Sugar Association Council, and provisions for arbitration." It was held that the parties were bound by the arbitration clause and that Becker, Gray & Co.'s proceedings under that clause ought not to

be restrained.* In *Produce Brokers Co., Lim.*, v. *Olympia Oil and Cake Co.* (No. 2), 85 L. J. (K. B.), 160, decided in the House of Lords by Earl Loreburn, Lord Atkinson, Lord Parker, Lord Sumner, and Lord Parmoor, the contract contained an arbitration clause which provided that "All disputes

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*The rules of arbitration of the Sugar Association are as follows:

"Rules relating to the Clearing Contract. Arbitration and Legal.

"351. Every form of contract printed or issued by or with the authority of the clearing department of the association shall be deemed to incorporate all the rules of the Sugar Association of London, clearing department, and shall contain a clause in the following form, viz.: The above mentioned rules, regulations and by-laws are incorporated in this contract, as fully as if the same had been expressly inserted herein, notwithstanding either or both of the parties to it be not a member or members (as the case may be) of the association. The committee is the referee of all disputes.

"352. Any disputes that may arise out of or in relation to any clearing contract, or out of or in relation to any alleged contract, circle, filière, bill of lading, warrant, or any other dealing or matter contemplated by the clearing rules, whether any such circle or filière has from whatever cause been interrupted or broken or not, and whether the members of the clearing department, or the parties to the contract between whom the dispute arise, are mutually contracting parties or not, shall be referred to the committee.

"353. Such submission or reference shall be in writing and shall be deemed to incorporate a provision for its being made a rule of any of the divisions of His Majesty's High Court of Justice in Ireland; and for the same, as well as the decision or award to be made in pursuance thereof, being registered for execution in the Court of Session in Scotland on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Ireland or Scotland respectively. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled in accordance with the provisions of rule 352, and it is expressly agreed that the obtaining an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract.

"354. Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the Court to require, any referee, arbitrator, or umpire, to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed."

* * * arising out of this contract * * * shall be referred to arbitration according to the rules endorsed on this contract." "By such rules it was provided that the reference should be to two arbitrators, one to be appointed by each party, and an umpire, whose decision in case of disagreement should be final, and in case either party should be dissatisfied with the award, an appeal should lie to the committee of appeal of the Incorporated Oil Seed Association." In this case Earl Loreburn, at page 163, said:

> "Parties have a right to prefer what some may consider the imperfect, though expeditious, wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts" and that the arbitral committee "had jurisdiction finally to find as they did in regard to the custom of trade * * * There is no magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitral tribunal. *With all respect, it seems to me that a Court plainly usurps the function of an arbitrator when it claims a right to decide that issue for itself on a submission such as we find here.*" (Italics ours.)

In this case Lord Sumner says at page 169:

> "During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contract which are invariably used, and created arbitral tribunals, formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The sys-

> tem has been devised by mercantile men to suit their needs, and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible."

In *Clough* v. *County Live Stock Insurance Association, Lim.*, 85 L. J. (K. B.), 1185, the clause which gave jurisdiction to the arbitrators is a most general one.* This clause was sustained. In *Stebbing* v. *Liverpool & London & Globe Insurance Co., Lim.*, 33 T. L. Rep., 395, 117 L. T. Rep. 247 (K. B. D.), May, 1917, before Earl Reading, *C. J.*, the policy provided that "all differences under this policy" shall be referred to arbitration. Under this clause it was held that the arbitrators could consider whether or not the statements made by the assured, upon the basis of which the policy was issued, were true; that though the untruth of the representations might avoid the policy, nevertheless "This is a matter of difference arising out of

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*"If a difference at any time arises between the Association and the Assured as to any amount payable, or as to any matter touching the rights, duties, and liabilities of the Assured or Association, or otherwise, in any way relating to, or arising out of the policy, every such difference when and as the same arises shall be referred to arbitration of some one person to be agreed upon by both parties or, failing such agreement, to two indifferent persons, one to be chosen by the party claiming and the other by the Association, and in case of disagreement between the Arbitrators such difference shall be decided by an umpire whose decision shall be conclusive and binding on both parties. The Arbitrator Arbitrators or Umpire, shall at the request of either party state the facts upon any question of law in the form of a Special Case for the opinion of the Court: Each party shall pay his or their own costs of the reference, and a moiety of the costs of the award (including the Arbitrators' and Umpire's fees). The Arbitrator or Arbitrators or Umpire shall fix a sum on account of his or their fees, and the costs of the award to be lodged with him or them, one half of such sum to be paid by each party before entering upon the reference. In all other respects the reference and award shall be subject to the provisions of the Arbitration Act, 1889."

the policy." *Gray* v. *Baron Ashburton,* 115 L. T. Rep., 729 [1917], A. C. 26, in which the House of Lords, Earl Loreburn, Viscount Haldane and Lords Atkinson and Shaw sitting, reversed the Court of Appeal. Rule 14 of Schedule 2 of the Aricultural Holdings Act 1908 provided that the costs of and incidental to the arbitration and award should be in the discretion of the arbitrator, and by Rule 15 the arbitrators should in awarding costs take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise. "The effect of those rules is to give the arbitrator appointed under that Act wider powers as to dealing with costs than those which a judge of the High Court has. Therefore where an arbitrator was acting within the discretion conferred upon him by the Acts, and there was no ground for suggesting either misconduct or want of jurisdiction, and he ordered that the successful party should pay the costs of the award, the court had no jurisdiction to interfere with his discretion." In the recent case of *Clements* v. *County of Devon Insurance Committee* (1918), 1 K. B. 94, decided in the Court of Appeal, the form of the agreement of arbitration was as follows:

> "any dispute or question arising between the committee and the practitioner * * * relating to the construction of this agreement or the rights and liabilities of the committee or the practitioner * * * hereunder shall be referred to the Commissioners." "Where under the provisions of these regulations or of any agreement made between the committee and a practitioner on the panel * * * any question arising between the committee and the practitioner * * * is referred, or any appeal from a decision of the committee is

made, to the Commissioners, the Commissioners shall determine such question or appeal in such manner as they think fit, and if in the opinion of the Commissioners a hearing is required they may authorise any two or more of the Commissioners to hear and determine such question or appeal, and any decision of the Commissioners or any of them made under this article shall be final and conclusive."

It was held that this was a valid submission to arbitration and that the commissioners were to be regarded "as the tribunal under a special form of arbitration to whom the parties have agreed to refer their differences" (p. 100). From *Lobitas Oil Fields, Lim.*, v. *Admiralty Commissioners*, 86 L. J. (K. B.), 1444, 117 L. T. Rep. 28, we learn that during the war there was created an "Admiralty Transportation Board," with power to arbitrate differences. *Brodic* v. *Cardiff Corporation* (1919), A. C., 337, was decided by the House of Lords in December, 1918. Here the contract in question provided "that in case any dispute should arise, either during the progress of the works or after the determination of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer, such dispute was to be referred to the arbitration and final decision of a single arbitrator, and either party might demand an immediate determination of the dispute." It was held by Lord Finlay, *L. C.*, Lord Atkinson, Lord Shaw of Dunfermline and Lord Wrenbury, Lord Sumner dissenting, that under this clause the arbitrators "had power to

award that the items in question should be paid for as extras, notwithstanding the absence of any orders in writing by the engineer." In this case Lord Wrenbury said:

> "The arbitration clause extends to any dispute between the corporation or the engineer on their behalf, and the contractor. The question whether the engineer ought to have given a written order is within those words. It extends to 'any matter or thing arising' under the contract. The right to payment under the contract is a matter arising under it. Of course so far as that right depends upon the true construction of the contract that is matter of law. But assuming that as matter of law upon the construction of the contract it is possible that payment is due, it is for the arbitrator to say whether upon the facts it is due or not. In other words, if the arbitrator can—as he can—review the action of the engineer in refusing an order in writing it must be that in reviewing he is by the contract empowered so to do, not idly and without result, but that he can as arbitrator give effect to that review by finding that the money is due, because the engineer was, as he finds, wrong in refusing the order which he was contractually bound to give" (pp. 365-366).

Re Arbitration between Wulff and Dreyfus & Co., 117 L. T. Rep., 583. D. & Co. sold grain to W., the contract containing clauses providing for arbitration.* Other clauses indorsed on the con-

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* All disputes arising from time to time out of this contract, including any question of loss appearing in the proceedings, whether arising between the parties hereto, or between one of the parties hereto, and the trustee in bankruptcy of the other party, shall be referred to arbitration according to the arbitration rule endorsed thereon: Neither buyer, seller, trustee in

tract provided that claims for arbitration should be made within a certain period, and that from the arbitrators' award there should be "a right of appeal in event of anybody being dissatisfied with the award" to the committee of appeal of the London Corn Trade Association. The dispute was as to whether the demand for arbitration had been made by W. within the time limited, and both the arbitrators and the committee on appeal held that it had not. W. then asked the committee to state their award in the form of a case for the opinion of the court (pursuant to Sec. 7 of the Arbitration Act, 1889), but "'on the suggestion of the sellers (D. & Co.), the buyer agreed that the question should be submitted to counsel in the same way as it would be submitted to a court under a special case.'" Counsel supported the arbitrators and committee, and then W. attempted to appeal to the courts. It was held by the Court of Appeal, sustaining the Divisional Court (K. B. Div.), that, if this had been a case where opinion and advice of counsel was asked upon a legal point, then an appeal would have lain to the courts upon the award stated as a case; but that since it was in fact the evident intention of the parties to submit the award stated in the form of a special case "to him (counsel) *as being substituted for the court—as a substituted court,* if I may use that expression—then it is plain that not only could the appel-

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bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled by arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising under this contract."

lant not challenge the award on the ground of error of law apparent on the face of it, but that *no appeal would be open to him;* because although the law allows an appeal to the court if a special case is stated for the opinion of the court, there is no appeal *if the parties choose to substitute counsel for the court."* (Opinion of Bankes, *L. J.,* p. 589. Italics ours.)

In *Woodall* v. *Pearl Assurance Company, Limited* (1919), 1 K. B. 593, decided by the Court of Appeal in February, 1919, the Court distinguishes the case of *Jureidini* v. *National British and Irish Millers Insurance Co.* (1915), A. C. 499, wherein the Court held that fraud vitiated the entire contract, including the clause for arbitration; and here, following the *Stebbing* case, held that where the company is repudiating liability under the contract upon the ground that the assured had misstated his occupation in the proposal, or, if not, had changed his occupation for one involving increased risk, of which notice as required had not been given and in consequence contended that the policy was void, this was a matter referable under the general arbitration clause.*

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*"Condition 11: 'If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith then the assured and all persons claiming through the assured may refer and shall be bound if the company shall so require to refer the same to arbitration by one arbitrator to be agreed on or in default of agreement by two arbitrators and their umpire under the Arbitration Act, 1889, who alone shall deal with all questions including costs, or if the claimant resides in Scotland then under the Arbitration (Scotland) Act, 1894, and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration.'"

There will be found in Chapter XVII, p. 227, an arrangement by chronology of the English cases prior to 1916, showing the influence of Lord Coke's dictum for revocability, Lord Kenyon's, Lord Eldon's, Lord Cranworth's and Lord Campbell's influence in favor of sustaining arbitration agreements, and the final series of cases down to 1914 which brought the English common law on this subject in harmony with the general doctrines of the common law, namely, that parties were to be encouraged to dispose of their controversies out of court and a contract based upon mutual concessions was not to be avoided in the particular in which parties agreed to arbitrate a controversy arising thereunder.

We have endeavored in Chapter XVII to trace the source of error of our American law and in Chapter XVIII the development of our law in the Federal Courts. We believe that *Insurance Co.* v. *Morse,* 20 Wall. 445, 22 L. Ed. 365; *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, 24 L. Ed. 148, and *Perkins* v. *United States, etc., Co.* (C. C.), 16 Fed. 513, rest upon an inadequate analysis of the English authorities, and that the decision by the Federal Circuit Court of Appeals in the Sixth Circuit, in *Toledo S. S. Co.* v. *Zenith Transp. Co.,* 184 Fed. Rep. 391, in 1911, Warrington, Denison and Hollister, JJ., is really the sound Federal law upon the subject —or should be so regarded. The case in the United States Supreme Court which is the basis for the prevailing Federal rule is *Insurance Co.* v. *Morse,* 20 Wall. 445, which rests upon the following proposition of Mr. Justice Hunt:

> "There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction" (p. 451).

This quotation is taken from *Scott* v. *Avery* and includes the reference from *Thompson* v. *Charnock* (Lord Kenyon) "that the fact that the parties had agreed that the matter should be settled by arbitration did not oust the jurisdiction of the courts." We confidently believe that this is an erroneous interpretation of *Scott* v. *Avery* and that treating *Thompson* v. *Charnock* as authoritative was error on the part of our courts; indeed, this is the same error as the error made by the Court of Appeals of the State of New York (see Chapter XVII, p. 228 *et seq.*). *Insurance Co.* v. *Morse* was decided in 1874. At that time the English authorities were still in a state of confusion, and so far as we have been able to discover no attempt has since been made to present to this court the change in the English law arising out of the later and better application of the principles of the common law to the subject, nor has there, so far as we know, been presented before to this court a comprehensive review of the development of the law upon this subject. It is quite true that Judge Story is frequently quoted for the doctrine of "ouster" (pp. 250, 251); but Judge Story's opinion rests upon Vynior's case and the since reversed English precedents resting thereon (see Chapter XVIII, p. 250).

IV.

The provision in the ordinary contract of merchants that, in the event of dispute or controversy, there shall be submission to arbitration, is not intended to "oust the courts of jurisdiction," but is merely expressive of the intent of the parties to keep out of court if they can and to endeavor to compose their differences either through conciliation or arbitration.

In *Scott* v. *Avery* Lord Chancellor Cranworth held that the intention of the parties was "that the sum to be recovered should be only such a sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and that the sum so ascertained by arbitration, and no other, should be the sum to be recovered." "And," said the learned chancellor, "if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly unimportant." (5 H. L. C. 811, at p. 849.) And in *Waters* v. *Taylor* Lord Eldon said:

> "* * * the forum they have provided for themselves * * * [it] shows their intention against the interference of any other jurisdiction, until they have tried the effect of the special means, provided by themselves" (15 Vesey Jr. 10, at p. 17).

The failure to interpret such clauses according to their common meaning and the insistence upon

some positive formula justifying the finding of a *condition precedent* has been due, we believe, to three things: (a) Failure to apply the customs and understandings of merchants; (b) failure to apply the doctrine of *Scott* v. *Avery* and *Halfhide* v. *Fenning;* (c) failure to appreciate that the dictum in Vynior's case has lost its authority (see Chapter XX, p. 266 *et seq*). Lord Ashbourne says in *Hamlyn & Co.* v. *Talisker Distillery,* 6 The Reports 188, page 201:

> "A contract which provided that disputes should 'be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way,' distinctly introduces a reference to well-known laws regulating such arbitrations, and those must be the laws of England. This interpretation gives due and full effect to every portion of the contract, whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed."

In the same case Lord Kinnear said:

> "The contract which they made in these circumstances is that disputes should 'be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.' Now, when a London merchant stipulates that disputes under his contract are to be referred to members of such a body as the London Corn Exchange—that is, to merchants or brokers carrying on business in the city of London—I think that that means that the tribunal is to be constituted and the arbitration conducted in London; and when it is further stipulated

> that the arbitration is to be by two members of the Corn Exchange, 'or their umpire, in the usual way,' *I think that that imports a reference to a known law and practice regulating the constitution and conduct of such arbitrations, and that can only be the law and practice of England.*" (21 Session Cases [4th Series] 204, at p. 212—italics ours.)

In *Daley* v. *People's Building, etc., Assoc.*, 178 Mass. 13, Judge Holmes (now Mr. Justice Holmes) held that an agreement by stockholders that, "Any action brought against this association by any shareholder shall be brought * * * in the County of Ontario, State of New York" was valid and a bar to a suit in Massachusetts. In this decision there is indicated no fear of "ouster" of the Massachusetts courts of any jurisdiction. Judge Holmes said:

> "It is true that in this case the question is not between counties, but between States, and that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here."

Nevertheless, he held that the clause should be sustained.

Parties are encouraged every day to oust the courts of jurisdiction of a controversy by settling their dispute "out of court." We are establishing throughout the country courts of conciliation to accomplish this result. The pacific adjustment of disputes is one of the rational aims of mankind. In 1693 Lord Stair, the great Scotch writer, wrote (at a period when commerce had made little progress in his own country) that Scotch law and custom

> "regard not inconsiderable damage in traffic, that it (a business contract) may be current and secure, for nothing is more prejudicial to trade than to be easily involved in pleas, which diverts merchants from their trade, and frequently mars their gain and sometimes their credit" (see *Mackenzie* v. *Girvan*, 3 Session Cases, 2nd Series, 318, at p. 323).

Judge Allen said in the *Pres't, etc., D. & H. Canal Co.* v. *Pa. Coal Co.*, 50 N. Y. 250, at p. 258:

> "But when the parties stand upon an equal footing and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not *easy to assign at this day* any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova,* I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, *to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon*" (italics ours).

The right of trial by jury is one that can be waived. The right to bring suit at all can be waived. The parties may waive it by agreement to forbear from bringing suit, or, after suit, by stipulating in open court to discontinue. They may even consent to the entry of judgment. By so doing, of course, they set aside and supersede the operation of the law

and such protection as it was designed and framed to afford. Yet this is not against public policy. (See *McAllister* v. *Smith*, 17 Ill. 328, 334; *Dike* v. *Erie Railway Co.*, 45 N. Y. 113, 116; *Grand* v. *Livingston*, 4 App. Div. 589, 593; *Union National Bank* v. *Chapman*, 169 N. Y. 538, 545; *Lee Breton* v. *Miles*, 8 Paige 261.) In the case of *The Oranmore*, 24 Fed. Rep. 922, the parties stipulated that

> "any questions arising under this contract or the bill of lading against the steamer or her owners shall be determined by English law in England."

The Court held that this was valid and that

> "the court should give effect to this clause of the agreement. It leaves the intention of the parties beyond doubt of any kind, and that intention was to give to the provisions of the bill of lading such efficacy as the English courts would give to them."

It is not any part of the duty of the court to prevent parties from settling their controversies in any manner they choose. As matter of fact, the courts are assiduous to enforce releases unless they have been procured through fraud, duress or mistake. In disposing of accounts stated, the courts are exceedingly reluctant to disturb adjustments that have been made. Yet by virtue of such settlements or exchange of releases grave questions of law frequently are kept from determination by the court, ofttimes questions the determination of which might contribute much to the comprehensive and complete development of the law. From the point of view of society, it might be urged sometimes that a determination of the particular ques-

tions of constitutionality or other law involved is of more importance than the disposition of the controversy immediately in hand, yet this consideration has never prevailed with the courts, nor resulted in the rejection of an adjustment or a settlement of the controversy, with the consequent waiver and elimination of an existing and perhaps important question of law. It has long been settled that the prevention of litigation is a valid and sufficient consideration for the settlement of a controversy:

> "For the law favors the settlement of disputes." (Parsons, "Law of Contracts," Vol. I, p. *438. See *Penn* v. *Lord Baltimore,* 1 Ves. Sen. 444; *Wiseman* v. *Roper,* 1 Chanc. 158; *Barlow* v. *Ocean Ins. Co.,* 4 Met. 270; *Stapilton* v. *Stapilton,* 1 Atk. 3; *Zane* v. *Zane,* 6 Munf. 406; *Taylor* v. *Patrick,* 1 Bibb 168; *Fisher* v. *May,* 2 Bibb 448; *Brown* v. *Sloan,* 6 Watts 321; *Stoddard* v. *Mix,* 14 Conn. 12; *Rice* v. *Bixler,* 1 W. & S. 456.)
>
> "No investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them." (Parsons, "Law of Contracts," p. *439. *Ex parte Lucy,* 21 E. L. & E. 199; *Mills* v. *Lee,* 6 Monr. 91; *Moore* v. *Fitzwater,* 2 Rand. [Va.] 442; *Bennet* v. *Paine,* 5 Watts 259; *Pierson* v. *McCahill,* 21 Cal. 122; *Clark* v. *Gamwell,* 125 Mass. 428; *Flannagan* v. *Kilcome,* 58 N. H. 443.)

No wonder we find in the footnote to *Corpus Juris* (Vol. 5, p. 53, note 12a) the rule of revocation called

> "a highly technical rule, and the enforcement of it against the purposes of parties who have sought a settlement of their disputes out of court by a tribunal of their own choosing has at times provoked protest from common-law judges."

And referring to the frequent provisions for arbitration in contracts relating to great public improvements (see Appendix D to the book), Judge Grier said, in *Fox* v. *The Railroad,* 3 Wall. Jr. 243, at page 247:

> "Such a clause in contracts like those constantly made by corporations for great public improvements, is absolutely necessary to prevent the corporations from being ruined by endless litigation. It should be liberally construed and not subjected to ingenious criticism in order to support the jurisdiction of courts of law and encourage litigation."

Judge Maule said:

> "The old rule upon which it was held that the power of an arbitrator was revocable, was, that a power not coupled with an interest, was revocable,—revocable by the authority which created it. From that rule it was inferred,—erroneously, as I think,—that one of the parties to a submission might revoke without the other. It seems to me that that was allowing one man to affect the interest of another. *But it was an inveterate error."* (*Northampton Gas-Light Co.* v. *Parnell,* 15 C. B. 630, 645, 80 E. C. L. 630, 139 English Reprint 572. Italics ours.)

Judge Parker, in the case of *La Greve* v. *Aetna Live Stock Insurance Co.,* 81 Hun 28, at page 30, said:

> "The suggestion that the Court should resent this attempt to oust it of jurisdiction is unworthy of extended notice";

and the great English judge, Jessel, Master of the Rolls, said:

> "* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." (*Printing and Numerical Registering Co.* v. *Sampson,* L. R. 19 Eq. 462, at p. 465.)

So, also, the late Judge Earl of the New York Court of Appeals said:

> "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce." (*Matter of N. Y. L. & W. R. R. Co.,* 98 N. Y. 447, at p. 453.)

This superb policy of the law is illustrated in many ways. The parties to a contract may require the commencement of an action within a period shorter than that required by Statutes of Limitations and thus make their own Statute of Limitation. They may limit their liability for negligence and may, indeed, provide an exclusive form of remedy which the courts will enforce. In an introduction to Bulletin XII, the American Judicature Society says:

> "The present universal fear of litigation, with its slow and costly procedure and interminable appeals, is a principal reason for this irregular method of reaching a settle-

> ment—for it ought not to be dignified by the name of arbitration. Its fault is not merely that of inexpertness, but that it is dominated by compulsion, not by mutuality. Arbitration is the means by which this growing function is to be methodized and regulated in a public manner. It should be viewed, not as hostile to courts, but as a special method of adjudication adapted to certain modern needs, a new arm of the law supplementing courts in a practical way."

As Mr. Harley says:

> "Arbitration is * * * a constructive social function weaving into the fabric of commercial life to strengthen rather than sever its threads."

V.

Conclusion.

It is the earnest hope of the Chamber of Commerce that the court will hear its plea, quite independent of the interests of the parties to the special controversy, and that it will take occasion to re-examine into the basis in reason and in authority for this judicially and commercially unpopular doctrine of the law. If we are correct in our belief that it is *not* a doctrine of the law, then surely the dead hand of unsound precedent should no longer paralyze the arteries of trade.

All of which is respectfully submitted.

CHAMBER OF COMMERCE OF THE
STATE OF NEW YORK,
By JULIUS HENRY COHEN,
Its Counsel.

Dated, February 20, 1920.